

UNITED STATES TAX COURT
WASHINGTON, DC 20217

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DONALD J. BROWN,)
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Petitioner(s),)
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v.) Docket No. 20006-13 L.
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COMMISSIONER OF INTERNAL REVENUE,)
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Respondent)
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ORDER

This case was on the Court's June 2, 2014 trial calendar for Buffalo, New York, but was stricken from the calendar and moved onto a summary-judgment track. The case arises from a notice sent by the IRS to Brown stating that it intended to levy his property to collect unpaid taxes. These taxes are trust fund recovery penalty (TFRP) taxes.¹ The IRS held Brown to be a responsible person for Hudson Steel Fabricators & Erectors, Inc. (Hudson Steel). Brown asked for a collection due process (CDP) hearing, and stated that he wanted a collection alternative -- which he ultimately specified was placement in currently-not-collectible (CNC) status.² The settlement officer denied this request, and Brown appealed. The Commissioner moved for

¹ Taxes that employers withhold from their employees' wages are known as "trust fund taxes" because they are deemed a special fund in trust for the United States under IRC § 7501(a). The Commissioner may collect unpaid employment taxes from a "responsible person" within the company; that is, someone who was required to pay over the tax. The money that is collected is called a trust-fund-recovery-penalty tax. Sec. 6672; *see also Pollock v. Commissioner*, 132 T.C. 21, 25 n.10 (2009).

² Currently-not-collectible status means the Commissioner won't take any collection action unless and until the taxpayer's finances improve. *Bennett v. Commissioner*, 96 T.C.M. (CCH) 319, 320 (2008).

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summary judgment and Brown, which we ordered should be treated as a cross-motion for summary judgment.

Background

The IRS notified Brown by a Letter 1153 that it was assessing a TFRP tax of nearly \$200,000 for unpaid payroll taxes owed by Hudson Steel. Hudson Steel was Brown's former employer, and the IRS held him responsible for its unpaid taxes under section 6672. Brown appealed the determination that he was a responsible person, and was notified that the Board of Appeals was turning his case over to the Collection Area Director. This letter also informed Brown that he could pay and file a Form 843, Claim for Refund and Request for Abatement, or that he could file a refund suit in the U.S. Court of Federal Claims or the U.S. District Court.

Brown did neither and then received a final notice of intent to levy in March 2013. He asked for a collection due process (CDP) hearing, and specifically requested that the Commissioner give him either an installment agreement or an offer in compromise (OIC). Settlement Officer (SO) Elizabeth Grant was assigned to Brown's case and scheduled a hearing. She told Brown that he had to complete a Form 433-A (a form that summarizes a taxpayers income and assets) and a Form 656 (a form a taxpayer uses to propose an offer in compromise) for her to consider collection alternatives.

During the CDP hearing in June 2013, Grant described to Brown the appeals process, explained how she found that the TFRP assessment was valid, and told him that he couldn't question the TFRP liability during the CDP hearing. She informed Brown that he would need to file a Form 843 to argue the underlying liability. Grant could not consider an offer in compromise because Brown had not filed a Form 656. Brown then said that he wasn't interested in seeking an installment agreement either. This left him with only a plea for being put in CNC status, but Grant told Brown that she needed his financial information to make a CNC determination, which hadn't yet arrived.

Grant received Brown's Form 433-A a few days after the hearing. She determined that Brown had equity in a retirement account that totaled nearly \$70,000 and a whole-life policy worth a little over \$20,000. Grant determined that CNC status wasn't appropriate because Brown had equity in his assets, and she cited Internal Revenue Manual (IRM) pt. 5.16.

In a follow-up phone call on June 25, 2013, Grant asked if Brown had access to the equity in the retirement account. Brown later responded by fax that he did. During the phone call, Brown cited IRM pt. 5.16.1.2.9, which allows the SO to grant CNC status if collection would cause hardship. Brown also tried to argue that he should not be liable, but Grant repeated that he could not dispute his tax liabilities in the CDP hearing.

Grant sustained the levy and sent Brown the notice of determination. Brown timely filed a petition with this Court contesting the notice. The Commissioner moved for summary judgment and Brown responded (which we treated as a cross-motion).

Discussion

We may grant summary judgment when there is no genuine issue of any material fact and a party is entitled to a judgment as a matter of law. Rule 121(b); *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992). The moving party (here, the Commissioner) bears the burden of showing that no genuine dispute of material fact exists, and the Court will view any factual material and inferences in the light most favorable to the nonmoving party. *Dahlstrom v. Commissioner*, 85 T.C. 812, 821 (1985).

The IRS is convinced that Brown is a "responsible person." Section 6672(a) allows the IRS to hold a responsible person liable for a penalty equal to any amount whose collection or payment he willfully avoided. Under section 6672(b), the IRS has to mail a preliminary notice to the responsible person to inform him of the IRS's intent to collect the penalty. This notice is the only prerequisite the IRS must meet before it can legally assess the penalty. *See Bishay v. Commissioner*, 109 T.C.M. (CCH) 1543, 1545 (2015). A taxpayer like Brown can appeal within the IRS, but if it determines that he is liable as a responsible person, then his case is passed on to the part of the IRS that assesses and collects tax debts. *Id.* This collection process generally leads to a notice and demand for payment in accordance with section 6303.

When the underlying tax liability is not at issue in a CDP case, the court reviews for an abuse of discretion. *Goza v. Commissioner*, 114 T.C. 176, 182 (2000). A court will not overturn an SO's decision unless it is based on an error of law, a clearly erroneous finding of fact, or that she had ruled irrationally. *See Antioco v. Commissioner*, 105 T.C.M. (CCH) 1234, 1237 (2013).

Because Brown is claiming that he should not be held to be a responsible person, he is disputing the underlying liability. *Bishay*, 109 T.C.M. (CCH) at 1546. In such cases, our review is *de novo*. *Goza*, 114 T.C. at 181-82. This is only the case, however, if the underlying liability was properly before the CDP hearing and then properly before us. There is no doubt that Brown raised this issue during his CDP hearing. 26 C.F.R. § 301.6330-1(f)(2). But for him to have the right to do so, he must *not* have had a prior opportunity to argue the issue of his liability. Sec. 6330(c)(2)(B).

We agree with the Commissioner that Brown fails this part of his test, because we have held many times before that a taxpayer has an opportunity to dispute the TFRP liability when he receives a Letter 1153. *Bishay*, 109 T.C.M. (CCH) at 1546. Brown received his Letter 1153 back in June 2011, and it gave him notice that he was being assessed as a responsible person for Hudson Steel's unpaid taxes. Brown appealed this decision within the IRS, but this administrative appeal was denied.

Brown similarly argues that Grant abused her discretion by not allowing him to request an offer in compromise based on doubt as to liability. Grant did so because this is a slightly indirect way for a taxpayer to challenge the underlying liability. *See Yesse v. Commissioner*, 95 T.C.M. 1615, 1617 (2008) (citing *Baltic v. Commissioner*, 129 T.C. 178, 183 (2007)). She was right about this, too, because Brown had received a Letter 1153. *Bishay*, 109 T.C.M. (CCH) at 1546. There's no error here.

But Brown's last argument is different. He argues that the IRS should have put his debt in CNC status because collection by levy would cause him hardship. "Hardship" is also a defined term in this area of law, and it exists if "satisfaction of the levy in whole or in part will cause an individual taxpayer to be unable to pay his or her reasonable basic living expenses." 26 C.F.R. § 301.6343-1(b)(4). However, "an account should not be reported as CNC if the taxpayer has income or equity in assets, and enforced collection of the income or assets would not cause hardship." IRM pt. 5.16.1.2.9 (May 22, 2012).

It is the taxpayer's burden to prove hardship, which he can do through submission of Form 433-A and corresponding documents proving his income and expenses. *See Vinatieri v. Commissioner*, 133 T.C. 392, 398-99 (2009). The determination should be based on a taxpayer's equity in assets, gross income, and necessary expenses. IRM pt. 5.16.1.2.9 (May 22, 2012). The settlement officer can also consider the following factors (not all are listed): the taxpayer's age, employment status and history, medical expenses, ability to earn, number of dependents, the amount reasonably necessary for food, clothing, and housing, the cost of living, and any other factor. 26 C.F.R. § 301.6343-1(b)(4)(ii).

The regulations give examples where there is hardship even though collection in full can be achieved. One example is of a taxpayer whose only asset is a retirement account that provides him pension income. If liquidation of the retirement account would leave him without adequate means to provide for basic living expenses, that is "hardship". 26 C.F.R. § 301.7122-1(c)(3)(iii).

If a taxpayer raises the argument that the proposed levy would cause hardship, then the SO needs to consider the argument. *Antioco*, 105 T.C.M. (CCH) at 1240-41. Failure to determine whether the levy would cause hardship is an abuse of discretion. *Id.*

In his cross-motion Brown claims that Grant did not consider all of his financial information before deciding that his account was not CNC. He specifically argues that his monthly expenses were larger than his monthly income. Brown substantiated his claim of hardship by providing documents such as his lease, nine months of utility bills, Travelers Insurance statements for renters insurance, water bills, bank account statements, etc. Brown stated that he lives off his retirement account to meet his basic daily living expenses.

Our role is not to decide if we would grant CNC for hardship, but only whether the SO abused her discretion by denying Brown CNC status. Our review is even more constrained by the *Chenery* doctrine, which directs us to review only on the basis of what the agency did, not what it could have done. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). And here's the problem for the IRS -- Grant's determination simply states that Brown has an ability to pay based on assets, citing IRM pt. 5.16.1.2.9. That's not quite what the Manual says -- this section actually states that "an account should not be reported as CNC if the taxpayer has income or equity in assets, and enforced collection of the income or assets *would not cause hardship*." *Id.* (Emphasis added). We have already held that if the taxpayer requests CNC status an SO *must* determine whether or not there is financial hardship. *See Riggs v. Commissioner*, 109 T.C.M. (CCH) 1507, 1509 (2015).

That's what the SO here did not do.

We recognize that a petitioner's lack of income is not dispositive if there is equity in assets. *Riggs*, 109 T.C.M. (CCH) at 1510. We agree with the Commissioner that the administrative record shows that Brown did have equity in his retirement account and did have equity in his whole-life policy. But the SO stopped there and did not consider Brown's gross income and necessary expenses. She did not determine whether Brown could pay his basic living expenses. That is an abuse of discretion. *See Antioco*, 105 T.C.M. (CCH) at 1241.

We conclude that the SO abused her discretion in upholding the determination that Brown's account should not be CNC. This means that we will grant Brown's motion, but we don't know whether Brown would prefer a supplemental hearing on remand or entry of decision in his favor.

The parties may expect the Court to set up a telephone conference to discuss this question, but in the meantime it is

ORDERED that respondent's motion for summary judgment is denied. It is also

ORDERED that petitioner's cross-motion for summary judgment is granted.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
January 24, 2017